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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4408 OF 2006

Kakasaheb Bajirao Gaikwad. Petitioner .

vs.

Indabai Akaram Gaikwad

& Anr. Respondents.

Mr. Vijay Killedar for petitioner .

Mr. Ashok Choregule for respondents.

CORAM : A.P. DESHPANDE, J.

DATE : 15th November, 2006.

P.C.

. Rule. Rule made returnable forthwith.
Taken up for final hearing by consent of the parties.

2. The peitioner is the original plaintiff who instituted a suit for declaration that the sale deed executed by defendant no. 1 in favour of defendant no. 2 is illegal. The peitioner is the nephew of his deceased uncle by name Akaram Gaikawad. The peitioner is claiming title under the testament of will whereas the purchaser respondent is claiming the title under a sale deed executed by the widow of

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the deceased. The plaintiff filed affidavit evidence-in-chief of himself as also two attesting witnesses to the will. However, in affidavit examination-in-chief filed on behalf of the attesting witnesses a statement remained to be made that the witnesses/deponents identify the thumb impression on the will to be that of the testator. In view of that omission, after the evidence of the three witnesses was over and before the evidence of the defendant could commence, an application was moved for recalling the attesting witnesses with a view to proving the execution of the will by the deceased testator. The rejection of the said application by the trial Court has given rise to the filing of this writ petition.

2. Taking a very hyper-technical view of the matter, the trial Court held that power contained in order 18 rule 17 could be invoked by the Court suo motu and the said provision does not vest a party to the suit any right to invoke the said power. Assuming that the petitioner could not have had recourse to the provisions of Order 18, rule 17, the trial Court could have had recourse to Section 151 of the CPC. In my opinion, ends of justice demand permitting the attesting witnesses to be recalled so that the will can be proved in accordance with law. For the lapse on the part of the counsel the plaintiff cannot be non-suited by refusing to

exhibit the will. Procedure is intended to further the cause of justice and not to defeat the same. In my view, if the impugned order passed by the trial court is not quashed and set aside, the same is bound to result in miscarriage of justice, in as much as the petitioner/plaintiff's case which is wholly based on a will, will be dismissed. In furtherance of cause of justice, the present writ petition deserves to be allowed.

3. The learned counsel for the respondents has tried to justify the order passed by the trial Court by contending that the recall of a witness cannot be permitted to cure the defect in the evidence. Alternatively, he submitted that if the writ petition is to be allowed the respondents be adequately compensated as they are dragged in unnecessary litigation on account of the lapse on the part of the petitioner. I am also of the view that the respondents needs to be adequately compensated. Hence, I pass the following order:-

4. The writ petition is allowed. The impugned order passed in Regular Civil Suit No. 328 of 2001 dated 21.3.2006 by the 2nd Joint Civil Judge, Junior Division, Miraj, is quashed and set aside. The application moved by the petitioner/ applicant at Exhibit-48 is allowed. The trial Court is directed to recall the attesting witnesses and permit the

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petitioner to lead examination-in-chief. However, it is further clarified that the respondents/defendants will have right to cross-examine the witnesses touching the evidence that would be led pursuant to this order on recall of the witnesses.

5. Rule is made absolute in the above terms.

6. This order is subject to the payment of cost of Rs. 10,000/- by the petitioner to the defendants which shall be proportionately shared by the defendants. Costs shall be paid within a period of two weeks from today.

(A.P. Deshpande, J.)